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NO. 93-723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *Petitioner,*

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~

BRIEF OF NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION AGAINST PORNOGRAPHY, "ENOUGH IS ENOUGH!", NATIONAL COUNCIL OF CATHOLIC WOMEN, FAMILY VIOLENCE & SEXUAL ASSAULT INSTITUTE, NAT'L POLITICAL CONGRESS OF BLACK WOMEN, ALLIANCE FOR THE RIGHTS OF CHILDREN, AMERICAN COALITION FOR ABUSE AWARENESS, CHILDHELP USA, CHILD WELFARE LEAGUE OF AMERICA, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, JUSTICE FOR CHILDREN, COALITIONS FOR AMERICA, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, FREE CONGRESS RESEARCH & EDUCATION FOUNDATION, SAVE AMERICA'S YOUTH, CITIZENS AGAINST PORNOGRAPHY, CHRISTIAN LEGAL DEFENSE & EDUCATION FOUNDATION, CHRISTIAN LIFE COMMISSION-SOUTHERN BAPTIST CONVENTION, TRADITIONAL VALUES COALITION, CHILD PROTECTION LOBBY, CHILD PROTECTION PROGRAM FOUNDATION, VOICES IN ACTION, "H.U.R.T.", NATIONAL CENTER FOR REDRESS OF INCEST & SEXUAL ABUSE, AS *AMICI CURIAE* URGING REVERSAL.

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Comes now the National Law Center for Children and Families ("NLC"), by and through Counsel, and moves this Court to permit it to file a brief *amicus curiae*. This Court issued a Writ of Certiorari on February 18, 1994 in this case. NLC seeks to file a brief *amicus curiae* urging reversal. Sup. Ct. R. 37.3 permits NLC to move this Court for leave to file a brief when a party has not consented to allow it to file.

Solicitor General Drew Days, who represents the government in the present case, has consented to NLC's filing of an *amicus curiae* brief. A copy of this consent has been filed with the clerk of this Court. Mr. Stanley Fleishman, Counsel for the Respondents, has not replied to NLC's request for consent. A copy of this request has also been filed with the clerk of this Court.

NLC represents a diverse coalition of interest groups. *Amici Curiae* in this case represent virtually every segment of the American body politic. Each member of the coalition supporting the attached brief regards the disposition of the present case as crucial to the emotional and physical well-being of children.

Amici Curiae will bring to this Court's attention legal authority and argument not present in the Petition for a Writ of Certiorari.

In view of the foregoing, the National Law Center for Children and Families should be permitted to file an *amicus curiae* brief urging reversal.

Respectfully submitted,

NATIONAL LAW CENTER FOR
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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. In view of the government's compelling interest in protecting children from visually recorded sexual abuse, do federal laws proscribing the distribution of child pornography violate the First Amendment where they do not contain a requirement of knowledge of minority status and where lack of such a requirement cannot be shown to impermissibly chill protected expression?

II. In view of the common law tradition of imposing criminal sanctions for the sexual victimization of minors without regard to knowledge of minority status, must knowledge of minority status be read into federal laws proscribing the distribution of child pornography in order that they be consistent with the Fifth Amendment?

III. If knowledge of minority status is present in federal laws proscribing the distribution of child pornography, what level of knowledge is in fact present?

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INTEREST OF THE *AMICI CURIAE*

Amici comprise a broad collection of public interest groups whose membership among others, include the survivors of childhood sexual abuse, pro-family and religious associations and professionals who expend considerable energy advocating legal and social reforms to protect children. *Amici*, while representing diverse political and religious perspectives, agree that this Court's decision in this case will directly affect the safety and well-being of children. For the Court's convenience, the Appendix contains a full description of all *Amici*.

STATEMENT OF THE CASE

This is an appeal from a decision of United States Court of Appeals for the Ninth Circuit. The Ninth Circuit invalidated 18 U.S.C. Section 2252 on its face because Section 2252 did not require that the government prove defendants accused of distributing child pornography have knowledge that the persons depicted therein are less than eighteen years of age. *See* Pet. for Cert. at 15a. The court below reached this result by deciding that the First Amendment requires this knowledge in order to avoid a chilling effect on protected expression which is similar to child pornography. *Id.*

At trial, the government introduced tape recordings of Respondent Gottesman admitting that he knew the videotapes he later transported interstate contained a minor engaging in sexual conduct. Gv't C.A. Excerpts of Record p.54 l.10-19. In fact, Respondent Gottesman offered to locate and distribute other videos containing Traci Lords as a minor engaged in sexual conduct. *Id.* at p.59 l.18-21. The videotapes at issue depict Lords engaging in explicit sexual

acts as young as age 15. Gv't C.A. Excerpts of Record p.40 l.8-10. Tragically, Traci Lords' participation in this illegal market -- a market existing only because people like Gottesman fuel and sustain it -- has left her seriously harmed. *See* S. Somers, *Wednesday's Children* 182 (1992) (Lords incompetent to testify in child pornography trial due to severe trauma).

SUMMARY OF THE ARGUMENT

The Ninth Circuit's interpretation of constitutional precedent fundamentally misapprehends the nature and function of a knowledge requirement derived from the First Amendment. As this Court's obscenity decisions have made clear, the purpose of a First Amendment-inspired knowledge requirement is to ensure that protected expression is not chilled when government criminalizes unprotected expression. Thus, the First Amendment does not require Section 2252 to include elements, such as knowledge of minority status, if their absence would not cause Section 2252 to infringe on First Amendment interests.

In the context of child pornography, the existence *vel non* of knowledge of minority will not infringe on protected expression. This is so because First Amendment precedent dictates that Section 2252 be construed to require that child pornography distributors know of the *sexually explicit character* of the pornographic material they transport interstate. Even in the context of obscenity laws, which are far more indeterminate than Section 2252, this Court has consistently held that the knowledge-of-character requirement adequately protects First Amendment interests.

Moreover, an unbroken tradition of imposing severe criminal sanctions for contributing to the sexual victimization of minors clearly demonstrates that Section 2252 does not offend the Fifth Amendment. At common law, laws prohibiting the sexual exploitation of children

wisely imposed criminal liability without regard to knowledge of the victim's minority status. Fifth Amendment precedent holds that Congress is presumed to have acted consistent with this tradition when it enacted Section 2252.

It is thus fully consistent with the First and Fifth Amendments for Section 2252 to empower the Government to prosecute those members of our society who choose to traffic in pornography which contains children, without shouldering the burden of affirmatively proving their knowledge of minority.

Alternatively, should this Court determine that some knowledge of minority is an element of a Section 2252 offense, precedent indicates that a showing of recklessness is constitutionally sufficient.

LAW AND ARGUMENT

I. 18 U.S.C. SECTION 2252 DOES NOT REQUIRE THAT THE GOVERNMENT PROVE SCIENTER AS TO MINORITY IN A PROSECUTION FOR DISTRIBUTING CHILD PORNOGRAPHY.

A. The Plain Meaning of Section 2252 Does Not Require Knowledge of Minority Status.

Plainly read, Section 2252 does not require knowledge of minority status. Section 2252 reads:

(a) Any person who-

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if-

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct.

In Section 2252, the adverb "knowingly" modifies the verbs "transports" and "ships," the interstate nexus requirement, and the phrase "visual depiction." The phrase "minor engaging in sexual conduct" occurs in an independent clause set off by indentation and in outline format. The independent clause, as written, is thus syntactically and visually distinct from the remainder of Section 2252. *Accord United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987); *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).

The Government cites several cases in its Petition and Reply Memorandum which arrive at the opposite construction. *See* Pet. for Cert. at 11 n.5; Reply Memorandum at 1-2. A common flaw permeates these decisions. In each case, the courts *assumed* (or cursorily decided without substantive analysis) that construing Section 2252 without a knowledge requirement for minority status would render the statute unconstitutional. *United States v. Colavito*, 1994 W.L. 76135 (2d Cir. Jan., 24, 1994); *United States v. Cochran*, 1994 W.L. 25599, *2 (3d Cir. Feb., 2, 1994). Accordingly, these courts relied on the well-settled rule that, in order to save a statute, courts should read a knowledge requirement into that statute. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Council*, 485 U.S. 568, 575 (1988). However, as will be demonstrated below, Section 2252 is fully constitutional without knowledge of minority status.

The proper method of analyzing the present case is to first determine whether the Constitution requires knowledge as to minority. If, as this brief demonstrates, such an element is not constitutionally required, *Cochran* and *Colavito* are of no consequence because the assumption, which forms the basis of these decisions, is erroneous and unfounded.[1]

[1] *Amici* are also aware that the First Circuit recently reached the same result as *Cochran* and *Colavito* using the same defective analytical method. *See United States v. Gifford*, 1994 W.L. 46738, *7 (1st Cir. Feb. 24, 1994). Similarly, the *Gifford* decision is of no importance.

Because Section 2252 is fully constitutional without a requirement of knowledge of minority status, a proper analysis of the present case will obviate any need to invalidate an act of Congress or insert, by judicial fiat, a knowledge requirement into a statute which has none.

B. Legislative History Further Demonstrates that Congress Did Not Intend to Include Knowledge of Minority Status as an Element of the Distribution Offense Defined by Section 2252.

The legislative history of Section 2252 supports A*mici*'s conclusion that knowledge as to minority is not an element of a Section 2252 distribution offense. In 1984, Congress amended Section 2252 to accommodate this Court's decision in *Ferber v. New York*, 458 U.S. 747 (1982), which held that government has the power to proscribe non-obscene pornography containing children. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 ("1984 Act"). The legislative history of the 1984 Act does not make reference to the knowledge element of Section 2252.

Thus, it is necessary to examine Congress' intent with respect to knowledge in the original version of Section 2252. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978)("1977 Act"). Congress' intent in the 1977 Act is clear. The conference committee indicated that Section 2252 was intended to impose criminal liability on any person "who knowingly transport[s], ship[s], or mail[s] for the purpose of sale or distribution ... any such material...." *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 95-811, 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 69, 71. The Joint Explanatory Statement of

the Committee of Conference does not indicate that a Section 2252 defendant must have knowledge that the proscribed material contains minors engaging in sexual activity. Furthermore, in a letter to the Senate Judiciary Committee, Assistant Attorney General Wald, now Judge Wald, correctly adduced that "the defendant's knowledge of the age of the child is not an element of the [Section 2252] offense." *See* S. Rep. No. 438, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 64.

It is natural to presume that Congress' intent not to require knowledge as to minority in the original version of Section 2252 carried over into the 1984 Act because the 1984 Act is silent on the question of knowledge.

In light of the legislative history of Section 2252, it is apparent that Section 2252 does not require the government to prove knowledge as to minority status.

II. THE FIRST AMENDMENT DOES NOT REQUIRE THE GOVERNMENT TO PROVE KNOWLEDGE OF THE MINORITY OF PERSONS DEPICTED "ENGAGING IN SEXUAL CONDUCT" IN A PROSECUTION FOR DISTRIBUTING CHILD PORNOGRAPHY UNDER 18 U.S.C. SECTION 2252.

A. Relevant Case Law Reveals that the First Amendment Requires Only General Knowledge of Pornographic Nature, and Does Not Require Knowledge as to the Minority of Children Depicted in Child Pornography.

The present case poses the question whether the Constitution mandates that 18 U.S.C. Section 2252 include an element of knowledge of the minority of children depicted in child pornography. An analysis of relevant precedent reveals that it does not.

On two occasions, this Court has addressed the constitutional propriety of proscriptions against child pornography. *Ferber v. New York*, 458 U.S. 747 (1982)(upholding federal statute proscribing distribution of child pornography); *Osborne v. Ohio*, 495 U.S. 103 (1990)(upholding state statute proscribing simple possession of child pornography). On neither occasion did this Court focus its attention on the question of what the level of knowledge the Constitution requires in the context of child pornography. *See Ferber* 458 U.S. at 765 (some knowledge required); *Osborne*, 495 U.S. at 114 n.9 (recklessness on the part of defendant accused of possessing child pornography is constitutionally sufficient showing of knowledge).

Section 2252 does not create a "pure" strict liability crime. Rather, it requires the government to prove that a distributor of child pornography have knowledge that he is transporting sexually explicit visual material interstate. Consequently, Section 2252 does not violate the *Ferber* Court's admonition that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765.

In *Hamling v. United States*, 418 U.S. 87, 119-24 (1974), this Court concluded that it is constitutionally sufficient to prove that the defendant in an obscenity prosecution knew of the nature and character of the material at issue. That holding is directly applicable here because *Ferber* explicitly incorporated it into the child pornography context. 458 U.S. at 765. What both the Government and Respondents urge on this Court, by agreeing that knowledge of minority status is constitutionally required, is an *additional*, particular knowledge requirement, one to which no decision of this Court has ever alluded. Imposing such a novel and onerous burden on child pornography prosecutions would directly contravene the legislative purpose of Section 2252 -- to protect children from visually recorded sexual abuse -- by inviting deliberate blindness on the part of pornography

distributors and forcing federal prosecutors to prove culpable knowledge despite this deliberate blindness.

By requiring knowledge as to the act of distribution and the pornographic nature of the material distributed, while not requiring knowledge of minority status, Section 2252 appropriately "put[s] pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." Roscoe Pound, *The Spirit of the Common Law* 52 (1921)(discussing propriety of strict liability statutes); *see also* Oliver Wendell Holmes, *The Common Law* 75 (1881)(strict criminal liability is appropriate because it forces one to "find out at his own peril whether the other facts are present which would make the act criminal"). Moreover, requiring distributors of expressive material to avoid distributing unprotected sexually explicit material is fully consistent with precedent. In *Hamling*, this Court observed:

> The precise course of the line [which every criminal statute draws] may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

418 U.S. at 124 (quoting *United States v. Wurzbach*, 280 U.S. 396, 399 (1930)); *see also Roth v. United States*, 354 U.S. 476, 491-93 (1957).

It is thus entirely consistent with precedent, and legislative purpose, for 18 U.S.C. Section 2252 to impose liability on child pornography distributors without requiring the Government to prove the distributor's knowledge of the minority status of the children depicted.

B. The Absence of a Specific Knowledge Requirement as to Minority Status Does Not Impermissibly Chill Protected Expression.

Contrary to the assertion of the court below, *Smith v. California*, 361 U.S. 147 (1959), does not mandate that Section 2252 require knowledge of minority. Rather, *Smith* and its progeny contribute to a regime of procedural and substantive requirements that this Court has imposed on government efforts to enforce adult obscenity laws. Laws proscribing the dissemination of child pornography, such as 18 U.S.C. Section 2252, have not been subject to similar constraints because they do not affect, in any significant way, the availability of protected expression. *See Osborne*, 495 U.S. at 110; *Ferber*, 458 U.S. at 773.

Smith stands for the proposition that statutes proscribing the distribution of obscenity must contain an element of knowledge. 361 U.S. at 150. In *Smith*, this Court invalidated an ordinance which imposed true strict criminal liability on retailers who distribute obscenity because it "tend[ed] to work a *substantial* restriction on the freedom of speech and of the press." *Id.* (emphasis added). The *Smith* requirement serves to guarantee that constitutionally protected speech will not be chilled when the government exacts criminal punishment for the distribution of obscenity. *See Roaden v. Kentucky*, 413 U.S. 496 (1973); *accord Mishkin v. New York*, 383 U.S. 502, 510 (1966); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (per curiam). The government has the right to eliminate obscenity but has no right to employ obscenity laws to censor otherwise protected sexually explicit expression. *Miller v. California*, 413 U.S. 15, 36 (1973). Obscenity -- illegal adult pornography -- constitutes a sub-set of a particular type of expression. Because there is a constitutionally protected "parent" class of adult pornography, government efforts to eliminate obscenity must be limited so as to minimize the

possibility that these efforts will chill protected pornography. Thus, it has been held that all pornography should be presumed to be non-obscene until proven otherwise. *See Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961); *accord Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62 (1989); *New York v. P.J. Video*, Inc., 475 U.S. 868, 873 (1986).

The Court in *Smith* simply sought to protect non-obscene pornography by forbidding true strict liability for the distribution of obscenity. In the face of criminal liability without fault for the distribution of obscenity, responsible retailers would, as a practical matter, be compelled to presume that all sexually oriented material could be unprotected obscenity and refrain from offering any sexually oriented material for sale. *Smith* was intended to avoid such an unfair result for the innocent and unknowing.

18 U.S.C. Section 2252, on the other hand, proscribes only pornographic materials containing children engaging in sexual conduct and is silent on the question of obscenity. In *Ferber*, this Court recognized that there is no constitutional right to produce or distribute pornography containing minors. 458 U.S. at 756. This Court has also recognized that government has more freedom to proscribe child pornography than to regulate obscenity. *Compare Osborne*, 495 U.S. at 111 (government may ban mere possession of child pornography) *with Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969) (government may not ban mere possession of obscenity). Moreover, this Court has never held that sexually explicit expression containing minors is presumptively protected by the First Amendment. This is so because the government's interest in eliminating child pornography is more urgently compelling than the government's interests in proscribing obscenity. *See, e.g., American Library Ass'n. v. Barr*, 956 F.2d 1178, 1181 (D.C. Cir. 1992) (interest in eliminating child pornography more important than interest in regulating obscenity).

Because there is no class of sexually explicit material containing visual depictions of minors engaging in sexual conduct that is protected by the First Amendment, the threat to protected speech that gave rise to the result in *Smith* is not present under 18 U.S.C. Section 2252. That is, the constitutional tension between a "parent" class of protected expression and a "sub-class" of unprotected expressive material is not present in the context of child pornography as it is in the obscenity context. Furthermore, the test for child pornography set forth in Section 2252 is objective and precise when compared to the test for obscenity. *Compare Mishkin*, 383 U.S. at 510 (describing obscenity doctrine as somewhat ambiguous) *with Ferber*, 458 U.S. at 764 (government need not prove prurient appeal or redeeming value); *see United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987)(federal child pornography standard not unconstitutionally vague). Because of this, responsible retailers can readily ascertain whether sexually explicit merchandise is unprotected child pornography. *See Mishkin*, 383 U.S. at 511 ("[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material *and to compensate for the ambiguities inherent in the definition of obscenity*")(emphasis added).[2] Proscribing pornography containing minors therefore runs no significant risk of restraining constitutionally protected speech. *Compare Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965)(purpose

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[2] In fact, this Court has not required blind adherence to the *Smith* decision. In *People v. Kirkpatrick*, 343 N.Y.S.2d 70, *appeal dismissed for want of a substantial federal question*, 414 U.S. 948 (1973), this Court let stand an obscenity statute which provided for a rebuttable presumption of knowledge once the fact of possession had been proven. Thus, even in the obscenity context, where the risk of chilling protected speech is far greater, this Court has permitted legislatures to apportion responsibility creatively. As with the statute in *Kirkpatrick*, Section 2252 does nothing more than require pornography distributors to shoulder the burden of ensuring that they do not engage in criminal conduct.

of presumption of non-obscenity to avoid prior restraints) *with Ferber*, 458 U.S. at 773 (laws proscribing child pornography unlikely to significantly restrain protected expression).

Accordingly, Section 2252 does not restrain protected expression in any significant way. Adult pornography is virtually unaffected by Section 2252. Likewise, Section 2252 does not affect visual depictions of children unless the depiction contains children engaging in explicit sexual conduct. Indeed, the only sort of expressive material which could conceivably be affected by Section 2252 as properly construed would be visual depictions of youthful-looking adults dressed like minors (so-called "simulated or pseudo-kiddie porn") engaged in explicit sexual conduct. Given the absence of substantial value in such expression (*see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (describing protected adult pornography as possessing slight social value)), and its demonstrated link to the sexual victimization of children (*see Osborne*, 495 U.S. at 111 n. 7), imposing liability on distributors of child pornography without requiring affirmative proof of their knowledge of minority status is, without a doubt, constitutionally appropriate.[3] Section 2252 advances the government's compelling interest in preventing "[the] sexual exploitation and abuse of children." *Ferber*, 458 U.S. at 757; *see* Janet

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[3] This Court could, under appropriate circumstances, engraft a good faith defense onto Section 2252 whereby pornography distributors would escape criminal liability. However, the present case does not present the appropriate vehicle to do this as Respondent Gottesman actually knew that the videotapes he distributed contained a minor engaged in sexual conduct. *See* Gv't C.A. Excerpts of Record p. 54; *see generally* Laurie Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993); *cf. United States v. United States District Court of the Central District of Calif.*, 858 F.2d 534 (9th Cir. 1988) (while knowledge of the performers minority status is *not* an element of a child pornography production case, it can be an affirmative defense.)

Reno & James Smart, *Dealing with Child Abuse and Neglect: a Prosecutor's Viewpoint*, 8 Nova L. Rev. 271, 274-75 (1984)(child sexual abuse necessitates legal intervention). As this Court has recognized, the distribution of child pornography contributes to child sexual abuse by fostering a market for pornographic depictions of child abuse that will likely be used to seduce other children into harmful sexual activity. *Osborne*, 495 U.S. at 111 & n.7. Section 2252 reduces the availability of this unprotected material by forcing distributors of pornography to monitor the material they sell.

III. THE FIFTH AMENDMENT DOES NOT REQUIRE THE GOVERNMENT TO PROVE KNOWLEDGE OF THE MINORITY STATUS OF CHILDREN DEPICTED "ENGAGING IN SEXUAL CONDUCT" IN A PROSECUTION FOR DISTRIBUTING CHILD PORNOGRAPHY UNDER 18 U.S.C. SECTION 2252.

A. Section 2252 Must be Construed Consistent with the Common Law.

1. Where a Criminal Statute Fails to Specify Knowledge, Courts Should Presume that Knowledge is Not Required if Analogous Common Law Crimes Did Not Require Knowledge.

In *Morissette v. United States*, 342 U.S. 246, 263 (1952), this Court held that Congress is presumed to incorporate the common law when it enacts a criminal statute that does not

explicitly provide for knowledge.[4] *Morissette* observed that the general rule at common law was to require knowledge as to each element of a crime. 342 U.S. at 251. However, *Morissette* went on to state explicitly that the common law recognized an exception (*i.e.*, an instance where knowledge was not required) to the general rule in the case of "sex offenses, such as rape, *in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached the age of consent.*" *Id.* at 251 n.8. (emphasis added). Because there was no precise analog to Section 2252 at common law, it is this tradition against which Section 2252 must be measured for Fifth Amendment purposes. *Cf. United States v. Brooks*, 841 F.2d 268, 270 (9th Cir.), *cert. denied*, 487 U.S. 1227 (1988).

This Court's subsequent treatment of the *Morissette* doctrine has reinforced the importance of construing modern criminal statutes consistent with their common law analogs and progenitors. In *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978), for instance, *Morissette* was relied on for the proposition that, where Congress fails to specify knowledge and the common law analog provided for knowledge, courts should read a knowledge requirement into the statute. *Accord Liparota v. United States*, 471 U.S. 419, 424-25 (1985). A necessary corollary to this is that where, as with Section 2252, the common law analog permitted strict

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4 Broadly speaking, the phrase "common law" denotes the body of legal authority which forms the basis of our legal system. *See* Black's Law Dictionary 276 (6th Ed. 1990). Thus, the phrase is not limited solely to case law or a particular historical period. *See United States v. Brooks*, 841 F.2d 268, 269 (9th Cir.), *cert. denied*, 487 U.S. 1227 (1988). The Court in *Morissette* recognized this when it classified so-called "statutory rape" as of common law origin. 342 U.S. 251 n.8. In fact, "statutory rape" was originally a creature of statutory enactment but has become a part of the common law as courts have interpreted and applied various statutes. *See, e.g., Commonwealth v. Miller*, 432 N.E.2d 463, 465 (Mass. 1982) (identifying 3 Edw. I, Stat., Westmin. I, c. 13 (1275) as original source for "statutory rape" offense).

criminal liability and Congress has failed to specify knowledge, courts should not read knowledge into the statute. *See Brooks*, 841 F.2d at 270.

In *United States v. Freed*, 401 U.S. 601, 609 (1971), this Court imposed strict criminal liability for the possession of unregistered hand grenades. This result was predicated on the common-sense observation that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* In other words, this result obtained in *Freed* because the act at issue was one which any reasonable person would know was impermissible and subject to some form of criminal proscription. Similarly, in the present case, Respondent Gottesman cannot credibly contend that knowledge of minority is necessary to ensure that he not be caught unaware or that Section 2252 would otherwise penalize innocent conduct. As with hand grenades, Respondent Gottesman could hardly be surprised to learn that the distribution of pornography depicting a minor engaged in the most explicit forms of sexual activity is not an innocent act.

2. At Common Law, Criminal Prohibitions Intended to Protect Children from Sexual Victimization Did Not Require Knowledge of Minority Status.

The common law approach to crimes intended to protect children from sexual victimization clearly demonstrates that a requirement of knowledge as to minority status ought not to be read into Section 2252. *See Morissette*, 342 U.S. at 251 n.8, *Liparota*, 471 U.S. at 427. The common law imposed pure strict liability on persons who sexually victimized children. *See, e.g., R. v. Prince*, L.R. 2 Cr.Cas.Res. 154 (1875), *reprinted in* [1874-80] All E.R.Rep. 881 (Bramwell, B.) In *Prince*, the House of Lords upheld a conviction for abducting a minor female with the intention of corrupting

her. *Id.*, at 885. The defendant in that case clearly established that he reasonably believed the girl to be of the age of majority. *Id.*; *see* Peter Brett, An Inquiry into Criminal Guilt 148-49 (1963) (identifying the defendant's conduct in *Prince* as immoral according to nineteenth century mores). The *Prince* court reasoned that culpable knowledge was irrelevant in this circumstance because abducting a minor female for immoral purposes was "wrong in itself." *Prince* at 884.

The *Prince* decision raises two points important to the present case. First, participating in the sexual victimization of a child is sufficiently beyond the pale that the common law considered the imposition of absolute liability to be justified. Surely the same holds true today, especially when the child victim has been as severely traumatized as Traci Lords. *See*, *Somers*, *supra* at 183 (Traci Lords describing herself "a drugged young girl who didn't care, who wanted to die, and that [performing in X-rated films] was my form of suicide"). Second, absolute liability shifts responsibility to adults to take great care not to participate in the sexual corruption of a child, even if the child appears to consent. Minors, then as now, are conclusively presumed to be incapable of informed consent so that salacious adults cannot victimize them. *See generally, Commonwealth v. Miller*, 432 N.E.2d 463 (Mass. 1982).

The *Prince* decision is also significant because a number of state courts in this country adopted it as the definitive statement on the common law regarding protecting children form sexual victimization. *See, e.g., Commonwealth v. Murphy*, 165 Mass. 66, 70 (1896); *Edens v. State*, 43 S.W. 89 (Tex. Crim. App. 1897); *Miller v. State*, 79 So. 314 (Ala. Ct. App. 1918);[5] *see also State v. Newton*, 44 Iowa 45 (1876)

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[5] In *People v. Ratz*, 115 Cal. 132 (1896), California also incorporated *Prince*. In *People v. Hernandez*, 393 P.2d 673 (Cal. 1964), the California Supreme Court altered *Ratz* by creating a reasonable mistake of age defense. This does not affect the strict liability character of "statutory rape" in California.

(reaching same conclusion without citing to *Prince*.) Thus, it has always been recognized that strict criminal liability represents an appropriate way of preventing the sexual corruption of minors.

3. At Common Law, Criminal Prohibitions Intended to Safeguard Children's Moral and Psychological Development Did Not Require Knowledge of Minority Status.

The common law also imposed strict criminal liability to protect children in related contexts. For instance, by 1885, twelve states imposed strict criminal liability for the sale of liquor to minors. *See, e.g., Redmond v. State*, 36 Ark. 58 (1880); *State v. Kinkead*, 17 A. 855 (Conn. 1889); *State v. McCutheon*, 69 Ill. 601 (1873); *State v. Clottu*, 33 Ind. 409 (1870); *Jamison v. Burton*, 43 Iowa 282 (1876); *Ulrich v. Commissioner*, 69 Ky. 400 (1869); *Carroll v. State*, 3 A. 29 (Md. 1885); *Commonwealth v. Finnegan*, 124 Mass. 324 (1878); *State v. Bruder*, 35 Mo. App. 475 (1880); *Perry v. Edwards*, 44 N.Y. 223 (1871); *State v. Cain*, 9 W. Va. 559 (1876); *State v. Hartfiel*, 24 Wis. 60 (1869). In each of these cases, courts did not require the government to show knowledge of minority status on the part of the defendant. The government only had to prove that the minor to whom the liquor was sold was in fact underage.

B. Other Modern Criminal Statutes Intended to Protect Children Do Not Require Knowledge of Minority Status.

The practice of not requiring knowledge of minority status has continued to the present day. In *United States v.*

Chin, 981 F.2d 1275, 1280 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 2377 (1993), the court held that knowledge of minority status was not constitutionally required in a prosecution for using a minor to conceal drug-related activities. Judge Ginsburg, writing for a unanimous panel, concluded that laws intended to protect children should not be construed "to invite blindness...to the age of youths." *Id.*, at 1280 (relying on *United States v. Curry*, 902 F.2d 912, 915-16 (11th Cir.), *cert. denied*, 498 U.S. 1015 (1990)). Significantly, Judge Ginsburg reached this result by relying on precedent which held that knowledge of minority status was not required when the involvement of minors in illegal activities merely gave rise to enhanced penalties. *Id.*, at 1280. In other words, Judge Ginsburg refused to require knowledge of minority status notwithstanding the fact the minority was a substantive element of the criminal statute at issue.

The *Chin* court relied on *United States v. Pruitt*, 763 F.2d 1256, 1261-62 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986). *Pruitt* declared that a federal law prohibiting the distribution of narcotics to persons under twenty-one years of age did not contain a requirement of knowledge of minority status. *Id.* at 1262 Similarly, in *United States v. Hamilton*, 456 F.2d 171, 172-73 (3d Cir.), *cert. denied*, 406 U.S. 947 (1972), the court held that knowledge of minority status was not required in order to mete out enhanced penalties for transporting minors interstate for immoral purposes under 18 U.S.C. Section 2423. These decisions make it clear that criminal statutes may constitutionally dispense with knowledge of minority status if the statute's purpose is to protect children and doing so furthers that purpose.

Against this backdrop, it is clear that Section 2252 does not, and need not, contain knowledge of minority status. First, the common law tradition of protecting children by imposing criminal sanctions without regard to knowledge of minority status is directly applicable. The manifest purpose

of Section 2252 was to protect children. *See* S. Rep. No. 95-438, *reprinted in* 1978 U.S.C.C.A.N. 40, 43-45. Neither the plain language nor the legislative history of Section 2252 suggest that it contains a requirement of knowledge of minority status. Second, contemporary criminal statutes with very similar purposes have been construed as not requiring knowledge of minority status. Thus, both historical and contemporary precedent reveal that Section 2252 contains no requirement of knowledge as to minority and that Section 2252, so construed, is fully consistent with the Fifth Amendment.

IV. IF THIS COURT DETERMINES THAT KNOWLEDGE OF MINORITY STATUS IS PRESENT IN SECTION 2252, A SHOWING OF RECKLESSNESS IS CONSTITUTIONALLY SUFFICIENT.

In the event that this Court should determine that some knowledge is present in Section 2252, precedent requires only that a Section 2252 defendant be reckless concerning the fact of minority status. *See Hamling*, 418 U.S. at 119-24; *Mishkin*, 383 U.S. at 510-11; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

In *Osborne*, this Court has in fact held that, in the context of child pornography, recklessness is a constitutionally sufficient level of knowledge. 495 U.S. at 115. *Osborne* is directly applicable to the present case. By imposing criminal sanctions on distributors who disregard a substantial risk that they are trafficking in child pornography, Section 2252 will compel distributors to take due care to ensure that the sexually explicit material they are distributing does not contain children. [6]

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[6] In its Petition, the Government erroneously asserts that there is no meaningful difference between an actual knowledge standard and a recklessness standard. *See* Pet. for Cert. at 11 n.4. This is patently

Furthermore, *Osborne* strongly indicates that the *Hamling* and *Mishkin* line of authority permitting proof of culpable knowledge through indirect and circumstantial evidence should be applied to Section 2252. *See Hamling* 418 U.S. at 121-22 (upholding obscenity conviction based on circumstantial evidence of knowledge); *Ginsberg v. New York*, 390 U.S. 629, 643-644 (1968) (same). The Court in *Mishkin* rejected the assertion of a defendant convicted of distributing obscene matter that there was insufficient proof of knowledge. 383 U.S. at 511. The *Mishkin* Court held that sufficient evidence of culpable knowledge had been introduced because the defendant had engaged in activities indicative of knowledge. *Id.* The same should be true in the context of Section 2252.

Section 2252 only imposes criminal sanctions against distributors who know of the explicit sexual nature and character of the material they distribute. In these circumstances, it is reasonable to expect the distributor to inspect the material to ascertain to whether it contains underage participants. Failure to so inspect is a reckless act.

In fact, in almost every case involving child pornography distribution, the circumstances surrounding the sale, transfer or receipt would put any reasonable person on notice that a minor is depicted in the pornography. For example, titles of video tapes or magazines such as "Lolitas" are obvious indicators. Advertisements for "young love" or "hot teenage sex," the text accompanying visual depictions and the pictures themselves are strong evidence that underage performers are involved. The market for child pornography demands that producers and promoters disclose the age of children involved and type of sex acts depicted. Pedophiles,

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incorrect. Permitting Section 2252 liability for disregarding a substantial risk (i.e., recklessness) is far more consistent with the purpose of Section 2252 than requiring proof of actual knowledge of minority as a *sine qua non* to criminal liability.

those who have a sexual interest in children, and molesters want to use the material to seduce children into sexual activity and will selectively purchase pornography involving children. Moreover, the price of child pornography will be much higher than for adult pornography and its delivery much more clandestine.

In short, the circumstances surrounding the distribution or receipt of child pornography will make it obvious to the purchaser, or distributor, that they are trafficking pornography involving children.

Given the ready availability of information which would put one on notice that pornography might contain children, recklessness is the appropriate level of knowledge to read into Section 2252. On the other hand, reading an actual knowledge standard into Section 2252 would be disastrous because the type of information available to pornography distributors imparts primarily constructive knowledge. An actual knowledge standard would have the untoward consequence of exonerating pornography distributors who have reason to know that their merchandise contains underage performers if the government cannot prove they were actually aware of this fact.

CONCLUSION

The decision of the Court below should be reversed and the present case should be remanded for reconsideration in light of Section 2252 as not requiring knowledge of minority status.

Respectfully submitted,

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APPENDIX

INTEREST AND DESCRIPTION OF THE AMICI

The **National Law Center for Children and Families** ("National Law Center"), based in the Washington metropolitan area, is a non-profit legal organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws across the nation and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through its legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

National Law Center attorneys assist many county, city and civic leaders around the nation in drafting and enacting new legislation concerning obscenity, child pornography, and materials which is harmful to minors. The National Law Center also disseminates information to legislators, law enforcers, public officials, and concerned citizens on pornography, its effects, and the laws which regulate it.

The National Law Center is dedicated to equipping law enforcement personnel with the background information, pleadings, and legal techniques necessary to win the war for our children and families. Presently, the National Law Center is involved in publishing training materials and reference manuals on child sexual exploitation and obscenity. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

The National Law Center has submitted numerous briefs to this Court in *Osborne v. Ohio, Alexander v. United States*, *Jacobson v. United States* and *Knox v. United States.*

The **National Coalition Against Pornography** ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity, indecency and child pornography and to implement a number of programs designed to minimize the threat they pose to our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity, indecency and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representative and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. The fundamental mission and purpose of N-CAP

is in protecting children through the elimination of child pornography and obscenity, and the restriction of indecency.

The **"Enough is Enough!"** campaign's mission is to greatly reduce sexual violence and to prevent children, women, men and families from becoming victims by eliminating child pornography and removing hard-core and illegal pornography from the marketplace.

This is an educational program with a plan to mobilize America's women in the battle against the abusive, predatory material that is flooding our nation. Pornography leaves in its wake broken lives and homes, as its chain of abuse victimizes women and their children.

The "Enough is Enough!" campaign includes women from varied backgrounds, professions, religions, non-profit organizations and political affiliations. This is a campaign with a focused target (that which is illegal), and a diverse, growing constituency. It is a unique effort in that moderate, liberal and conservative women are joining together to deal with hate literature which eroticizes inequality and violence, preys upon children and holds a fatal attraction for many men.

Over 30% of the states' First Ladies and numerous other women of influence have become members of the National Committee of Support, and this list is expanding.

The national launch of the "Enough is Enough!" campaign was held November 1992. Since that date, educational meetings and training seminars have been held in cities from coast to coast. This campaign is not creating a new organization, rather, initiating a movement. Local action is on the increase as women are empowered to bring about change. They are encouraged, educated and provided with materials

to equip them to succeed in their efforts. Women are investing their influence to change the way America thinks about pornography.

The **National Center for Missing and Exploited Children** (the "Center") is a non–profit, tax–exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under 42 U.S.C. §§5771–5777, including operation of the national toll–free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service, U.S. Postal Inspectors Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearing-

house, non–profit organizations, and interested child advocates, and training to professionals.

The **Child Welfare League of America** ("CWLA") is a federation of more than 700 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality program, practice and policy in the field of child welfare, including child protective services. CWLA standards for quality practice address services to abused and neglected children, including children who have been sexually abused. CWLA standards expressly recognize that child sexual abuse includes the exploitation of children and child pornography. CWLA is committed to strong legal protections to ensure that children are not abused through pornographic exploitation and that children are not placed at heightened risk of sexual abuse and victimization by pedophiles as a result of child pornography.

The **National Council of Catholic Women** is a nationwide federation of 8000 Catholic women's organizations representing millions of Catholic women. NCCW acts through its affiliated organizations to support, empower and educate all Catholic women in spirituality, leadership and service. NCCW programs respond with Gospel values to the needs of the Church and society in the modern world.

Childhelp USA has come to the aid of children in distress since 1959. Childhelp is committed to fighting child abuse and neglect with research, treatment, and prevention programs. We operate the National Child Abuse Hotline (1-800-4-A-CHILD and 1-800-2-A-CHILD for the hearing impaired with TDD equipment), America's only 50-state, 24-hour, toll-free crisis intervention program. The Hotline is staffed by trained counselors with a masters degree or higher

and has a data bank of over 60,000 service providers across the country. Childhelp also operates two residential treatment facilities for the most severely physically and sexually abused children ages 2 through 12, one in southern California, and one in central Virginia, and recently initiated programs in Knoxville, Tennessee. Our services include therapeutic foster homes, Head Start programs, group programs for teen and adult survivors of abuse, training programs for child care workers and foster parents, and education and advocacy initiatives.

The **American Coalition for Abuse Awareness** ("ACAA") is an ad hoc coalition of individuals and groups committed to resolving the issue of sexual abuse of children. The ACAA has been founded to seek enactment of federal and state legislation establishing the right of a child to be free from sexual victimization, and appropriate protections to assure that such victimization does not occur; enactment of federal and state legislation extending or eliminating statutes of limitations relating to civil lawsuits brought by adult survivors of childhood sexual abuse; formation of a broad based Coalition to support such legislation; development of public and media awareness of the issue of sexual abuse of children; establishment of a comprehensive network of legal professionals nationwide dedicated to advancing the legal rights of victims of childhood sexual abuse through the justice system; development of educational outreach programs for members of the judicial and legislative branches of government; establishment of a national body to make policy recommendations on issues related to childhood sexual abuse, protection of children, and adult survivors of abuse.

Focus on the Family is a Christian, non–profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world. Focus on the

Family's President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus on the Family has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Focus on the Family daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Focus on the Family regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

The **Family Violence & Sexual Assault Institute** ("FVSAI") was established in 1984 by Robert Geffner, Ph.D. The FVSAI became an independent, nonprofit corporation (501[c][3]) in 1991. The first Family Violence bulletin (FVB), now the Family Violence & Sexual Assault Bulletin (FVSAB), was published in 1985. The FVSAI is a national resource center and maintains an international clearinghouse of references and unpublished papers concerning aspects of family violence and sexual abuse, reviews information and materials, and then disseminates the information in the FVSAB, which is published quarterly and distributed internationally. The overall purposes of these two components of the FVSAI is to improve networking among

researchers, practitioners, and agencies, and to disseminate information.

In addition, the FVSAI, in cooperation with crisis centers, agencies, and counseling clinics, is involved in developing treatment programs for spouse/partner abuse and sexual abuse. We have also published two treatment manuals and four bibliographies, and are working on others. The focus of our program's research has been on victims and offenders of spouse/partner abuse and of incest.

The final components of the FVSAI involve training and consultation. We conduct seminars and workshops nationwide, as well as educational programs and conferences. We also serve as consultants to various organizations and agencies, providing program evaluation, research, and technical assistance.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

The **National Center for Redress of Incest and Sexual Abuse** ("Center for Redress") is a foundation established to

address the legal needs of adult survivors and child victims of sexual abuse. Located in Washington, D.C., its purpose is to build a comprehensive network of attorneys across the country who are dedicated to furthering the rights of survivors under the law; to develop educational outreach programs, focusing on members of the judicial and legislative branches of government; to facilitate a national grassroots effort to support projects in progress on the issue of sexual abuse and incest; and to litigate test cases under civil law related to childhood sexual victimization. The Center for Redress believes that the connection between childhood sexual abuse and child pornography has been established beyond doubt, and supports the enforcement of laws aimed at preventing the production and distribution of child pornography, such as the law at issue in this case.

The **National Political Congress of Black Women** was founded in 1984 to empower African American women and their families, socially, politically, and economically.

We have recently launched a crusade to ban "Gangsta Rap" which promotes and glorifies violence, drugs, and explicit sex. Much of this pornographic rap also defames and denigrates women. Fifty percent of "Gangsta Rap" is sold to minors under the age of 17 of which half are between the ages of 10 to 14.

We are pleased to join the National Law Center as *amici curiae* in support of reversal of the lower court's decision.

Help Us Regain The Children, a national legal research center and lobbying entity, has inspired both state and federal legislative investigations and hearings on the sexual abuse and exploitation of children caught in the family court and child protective system. Child advocates, legal experts, mental health professionals and parents of sexually abused

children have been brought by our center to the attention of the legislature for the purpose of building an impressive record, detailing the severity of malfunctioning of our courts and social agencies in their role to protect children from predatory harm.

One of the pivotal reasons for the devastating collapse of our esteemed governmental bodies to shield innocent children from their perpetrators is the high level of debauchery and prurience suffusing society. This pestilence is a direct result of the saturation of our country with child pornographic material that commands prodigious profits as an expanding and metastatic industry. We are resolutely convinced that adding the extra burden of scienter as to minority is not only outside of the 1977 law, the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. Sec. 2252, but it unfairly narrows the definition of the crimes of child pornography to the point where perpetrators will be granted license to commit these heinous crimes with relative impunity.

VOICES In Action, Inc. is an international organization of survivors and supporters of survivors of incest and child sexual abuse that is dedicated, among other things, to the prevention of incest and child sexual abuse in our society. VOICES is a nonprofit organization headquartered in Chicago, and is the largest membership organization of incest and child sexual abuse survivors in the United States. VOICES' members believe that child sexual abuse is not limited to intercourse, but includes other forms of sexual violation, such as voyeurism, pornography or exhibitionism.

VOICES is strongly committed to ending the traffic of child pornography in all its forms. VOICES therefore urges in the strongest possible terms that this Court reverse the lower court.

The **Free Congress Research & Education Foundation** is a non-profit , non-partisan public policy research institute founded in 1978. Its priorities include the separation of powers, judicial restraint, and traditional family and social values. Amicus believes this case directly implicates all three of these fundamental concerns. The separation of powers means that Congress enacts statutes like the one in this case and the Department of Justice is to enforce, rather than re-write, those statutes. Judicial restraint requires fidelity to the statutory meaning intended by Congress over that preferred by the Department of Justice. Traditional values means protecting children from abuse, as Congress sought to do in this statute.

Coalitions for America is a non-profit lobbying organization whose priorities include the protection of children from abuse. To that end, amicus seeks to promote protective, yet constitutionally permissible, legislation. Amicus urges this court to apply traditional rules of statutory construction to preserve the intended meaning of the statute at issue.

Save America's Youth , Inc., is a non-profit educational and advocacy organization concerned with the problems facing young people in America today. Amicus is affiliated with Freedom Village, USA, a successful long-term rehabilitation facility for troubled teenagers. Through that association, amicus knows first-hand the permanent and tragic effects of child abuse, including the sexual abuse that is child pornography. *Amicus* believes the statute at issue in this case can help combat this evil only if the protective legislative intent behind it is upheld.

Citizens Against Pornography is a non-profit organization with the purpose of educating and informing the

public about the harmful effects of pornography, and promoting and encouraging enforcement and prosecution of obscenity and child pornography laws.

We believe that pornography is not a victimless crime. The dehumanization, assault on human dignity, and violence that is promoted through pornography destroys the very fabric of society.

Our belief is that our children are our greatest natural resource and we must do everything to protect them from being exploited and abused. Child pornography is a most heinous crime. The 1984 Child Protection Act has been used for the past ten years to successfully prosecute pornographers. The intent and purpose of the Act must not be discarded because of a political agenda. Our children's lives and innocence must be protected.

Because both the Justice Department and the Respondents have betrayed and endangered our children, we wish to be on record stating our interest and support for this brief.

Christian Legal Defense and Education Foundation is a non-profit organization that represents churches and individuals across the nation. CLD provides legal counsel, Washington representation, and researching services to their supporters. The organization has filed many amicus briefs in the past in cases that directly address a concern that Christians share across America share. Most recently CLD filed a brief before the Supreme Court in *Alexander v. U.S.* a case where it was determined that the RICO laws could be used against pornographers.

The *United States v. X-Citement Video* case is of particular interest to CLD because it deals with pornography,

children and the weakening of a long-standing statute. Christians in America want to protect children and punish those who deal wickedly with them. Our supporting churches have pledged their prayers, time, and money to battle the reinterpretation of the federal Child Protection Act. On behalf of all of our supporters, CLD asks this court to maintain their previous position in this case and let the correct interpretation of the statute stand as it has for the last nine years.

The **Christian Life Commission/Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.4 million members in nearly 38,400 local churches. The Christian Life Commission is the public policy agency of the Convention, assigned to address moral and ethical issues, including the issue of pornography and obscenity. Amicus produces publications and seminars to educate Southern Baptist about public policy issues, to encourage responsible Christian citizenship as well as personal biblical decision-making in daily Christian life. Amicus also seeks to bring biblical principles and Southern Baptist convictions to bear before courts, legislatures and policy making bodies. *Amicus* frequently files briefs as *amicus curiae* in cases important to family and morality, such as this case.

Traditional Values Coalition ("TVC") is a grassroots lobby and education group representing more than 31,000 churches nationally. TVC is used as a resource on public policy issues for its member churches. The churches serve as a resource to the community with various ministries to people grappling with pornography addiction and victims of pornography-related sexual abuse.

Traditional Values Coalition has taken a leadership role on issues relating to pornography since 1985. TVC monitors,

evaluates and affects legislation, court actions, and cultural trends to take an informed and aggressive stand against pornography. TVC actively lobbied Congress in support of the Pornography Victims Compensation Act of 1991.

In the California legislature TVC successfully lobbied for a bill that instituted most of the Miller Standard for the state of California, allowing the state to maintain a standard of decency by which all works of pornography are judged. TVC has also promoted other anti-pornography bills including, the News Rack Bill (prohibiting the sale of pornography in vending machines except in adult only areas), the Dial-A-Porn Bill (preventing children from accessing phone pornography without a credit card) and a bill that would make it a crime for parents to expose their children to pornographic material.

TVC's founder and chairman, Rev. Louis P. Sheldon, has held and addressed Minister's Conferences on the impact of pornography on America's culture. Rev. Sheldon has also debated the issue on numerous television and radio programs.

TVC is headquartered in Anaheim, California, and maintains a Washington, D.C. government affairs and media office on Capitol Hill, as well as several regional offices around the country.

Justice for Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. JFC works for the child who is abused, abandoned, neglected or simply lost in the child welfare, family court, and/or criminal justice systems. Unlike other child advocacy organizations which have been formed to prevent child abuse through education and social programs, JFC focuses on protecting the abused child once an initial report has been

made to the authorities. We work and speak for those who are too young or too frightened to speak for themselves.

Alliance for the Rights of Children ("ARCH"), a national alliance of children's rights advocacy organizations, respectfully urges the U.S. Supreme Court to grant certiorari on the above case on the issue of whether the first amendment requires that the government prove scienter as to the minority of "pornographic actors and actresses" in a prosecution for distributing child pornography under 18 U.S.C. Sec. 2252.

This *amicus* brief eloquently supports the position that child pornography is by definition obscene and its purveyors should have no defense. Alliance for the Rights of Children is working nationwide with thousands of organizations and individuals who are concerned over the rising reports of child molestation and the failure of the legal system to protect the victims. Child pornography is a multi-billion dollar international business that promotes and perpetuates sex crimes against children.

ARCH strongly supports the arguments in this brief.

Child Protection Lobby, Inc. is a California non-profit 501(c)(4) corporation based in suburban Washington, D.C. Child Protection Lobby is chaired by Kathleen M. Sheldon, a survivor of child sexual abuse and victim of child pornography. Over a number of years, beginning at age seven, Mrs. Sheldon was raped and forced to perform a variety of sexual acts with others, on camera, for the purpose of producing child pornography. Mrs. Sheldon is a living, "flesh and blood" example of the direct causal link between child pornography and child sexual abuse.

As an organization whose sole purpose is to ensure that laws exist to protect children from horrors like child pornography and child sexual abuse, Child Protection Lobby believes that it is essential that all such violations of both the letter and the spirit of the law be vigorously enforced and prosecuted and that such laws be interpreted as inclusively as possible, as was the Congressional intent.

Child Protection Program Foundation, Inc. ("CPPF") is a Delaware non-profit 501 (c) 3 corporation based in suburban Dallas, TX. CPPF is a 300,000 member group that publishes a 32 page "Child Protection Guide" to teach parents and educators how to recognize and cope with child sexual abuse. There are well over 3 million Child Protection Guides in circulation.

As an organization whose principal purpose is to help parent protect children from the horrors of child sexual abuse, of which child pornography is a leading cause, CPPF believes that it is essential that all such violations of both the letter and the spirit of the Child Protection Act be vigorously enforced and prosecuted and that such laws be interpreted as inclusively as possible, in keeping with the original Congressional intent.